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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 751

WILLIAM DONALD CARMICHAEL, JR., PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA; HENRY P. BRANDIS, JR., DEAN OF THE LAW SCHOOL OF THE UNIVERSITY OF NORTH CAROLINA; LEE ROY WELLS ARMSTRONG, DIRECTOR OF ADMISSIONS OF THE UNIVERSITY OF NORTH CAROLINA; ARCH T. ALLEN, SECRETARY OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA; AND THE UNIVERSITY OF NORTH CAROLINA, A BODY INCORPORATE, *Petitioners,*

vs.

FLOYD B. McKISSICK, SOLOMON REVIS, JAMES LASSITER AND J. KENNETH LEE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the defendants above named, the appellees below, respectfully pray for a Writ of Certiorari to the

Court of Appeals for the Fourth Circuit to review a judgment of that Court entered March 27, 1951, reversing a judgment of the District Court entered October 9, 1950, and remanding the case to the District Court with directions to enter judgment granting the relief prayed for.

A certified transcript of the record in the case, including the proceedings in the Court of Appeals, Fourth Circuit, is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved

This action was brought by Harold Thomas Epps and Robert Davis Glass, negroes and students at the North Carolina College Law School, to compel the defendants to admit them to the Law School of the University of North Carolina, at Chapel Hill. Prior to the trial in the District Court, the original plaintiffs were withdrawn because one had graduated at the North Carolina College Law School and been admitted to practice in North Carolina and the other was not a citizen of that State, and the present plaintiffs, also negroes and students at the North Carolina College Law School, were permitted to intervene.

The case was tried before the District Court, Middle District of North Carolina, August 28 to August 30, 1950, without a jury. The trial court made and entered findings of fact and judgment denying the relief prayed for by the plaintiffs, and dismissing the action.

The plaintiffs appealed from the judgment of the District Court to the Court of Appeals for the Fourth Circuit, which reversed the judgment of the trial court and ordered the case remanded with directions to enter judgment granting the relief prayed for by plaintiffs.

North Carolina has operated a Law School for white stu-

dents, as a part of the State University at Chapel Hill, since about 1900.

North Carolina has operated a Law School for Negroes, as a part of the North Carolina College at Durham, since 1940. It was created by an Act of the General Assembly in 1939 and has operated continuously since 1940. It is accredited by the American Bar Association and the State Board of Law Examiners. Its petition for approval by the Association of American Law Schools is pending and demonstrates that all qualifications for membership are possessed (Finding No. 12).

After hearing all of the evidence, the argument of counsel, and making a personal inspection of the two Law Schools, the District Court made extensive findings of fact by way of comparison of the two schools and the opportunity for legal education afforded by both, and concluded "that the four intervenors in this case, by attending the Law School at the College in which they are now enrolled and in which they were enrolled at the time of intervening in this case, and continuing their studies at said institutions, can obtain a legal education substantially equivalent to that offered by the State of North Carolina to residents of this state attending the Law School at the University . . . that the State of North Carolina . . . has not denied to said parties the equal protections of the laws in violation of the Fourteenth Amendment to the Federal Constitution, and that the State of North Carolina has not, by providing said separate but substantially equal Law School, in any way discriminated against the plaintiffs by reason of their race, but has provided for them a substantially equal opportunity to obtain a legal education."

In the opinion of the Court of Appeals for the Fourth Circuit, it is said: "the duty of the Federal courts, however, is clear. We must give first place to the rights of the

individual citizens, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies."

The Court of Appeals held, contrary to the decision of the District Court, that North Carolina violated the Fourteenth Amendment by requiring the intervenors to attend the Law School for Negroes by holding, "It is a definite handicap to the colored student to confine his association in the law school to people in his own class" and without weighing this consideration against the many obvious benefits to these students in attending the college Law School.

The Court of Appeals did not expressly hold that the findings of fact made by the District Court as to the adequacy or comparability of facilities offered were "clearly erroneous".

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, USC, Section 1254(1).

The opinion of the District Court is reported in 93 F. Supp. 327.

The opinion of the Court of Appeals entered March 27, 1951, is reported in 187 F. (2d) 949.

Statutes Cited

General Statutes of North Carolina, Chapter 116, sec. 100.

Questions Presented

1. Did the Court of Appeals err in refusing to hold that the constitutional requirement of the Fourteenth Amendment was discharged if the two law schools, considered as a whole and considering the strength and weakness of each, provided a substantial equal opportunity for a legal education?

2. Did the Court of Appeals err by adding to the "separate but substantially equal rule" requirements and conditions which preclude any possibility of maintaining a separate law school for negroes contrary to the controlling decisions of this Court?

3. Did the Court of Appeals err in disregarding the findings of fact made by the District Court as to the facilities offered by the two schools which were supported by competent evidence and not "clearly erroneous"?

Reasons for Granting the Writ

Your petitioners respectfully pray that the Writ be allowed for the following reasons:

1. The State of North Carolina is in effect the defendant in this action and the decision of this case affects a question of public policy of vast importance to that state and all of its citizens in providing educational facilities in professional and graduate state supported colleges.

2. The decision of the Court of Appeals for the Fourth Circuit is out of harmony with *Plessy* v. *Ferguson*, 163 U. S. 537 (which this Court declined to reconsider in *Sweatt* v. *Painter*, 339 U. S. 629), in creating an uncertain and impossible criterion for determining the validity of excluding a member of a minority racial group from a law school maintained exclusively for a majority racial group.

3. The decision of the Court of Appeals for the Fourth Circuit is out of harmony and in conflict with the decision of this Court in *Sweatt* v. *Painter*, 339 U. S. 629, in that its opinion is to the effect that "the separate but equal doctrine" permits an individual to decide which law school provides him the greatest advantage and to attend his choice even though the opportunity for legal education afforded by both schools is substantially equal.

4. The question decided by the Court of Appeals, Fourth Circuit, is an important question of Federal Law which

should be settled by this Court to the end that the State of North Carolina and other states, acting in good faith, may know if it is possible to establish and maintain separate law schools for the negro and white races.

North Carolina has no absolute segregation policy requiring segregation in all professional schools. Thus, since it maintains no separate medical school for the education of negroes, it has admitted to the University Medical School one of three or four negro applicants and that applicant is now duly enrolled. The test applied to negro applicants was the same test as was applied to white applicants for admission into the School. Of approximately 700 white applicants, 55 were accepted in a total class of 56.

As indicative of the good faith of the state in providing equal professional education for negroes and whites, the Board of the Trustees of the University have—since the hearing in the Circuit Court—adopted the following resolution, which is a matter of public record:

RESOLUTION APPROVED BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA ON APRIL 4, 1951.

"(1) The Dean of each graduate or professional school shall be responsible for the formulation of rules and standards of admission for student applicants. Such rules and standards shall be consistent with the purposes and functions of the consolidated University of North Carolina as disclosed in the State constitution and statutes and shall include scholarship, residence and character requirements. In each case, the rules and standards shall be submitted to and approved by the Chancellor and by the Chancellor submitted to the President of the consolidated University for his approval.

"(2) In all cases of applications for admission by members of racial groups, other than the white race, to the professional or graduate schools when such schools are

not provided by and in the State of North Carolina for such racial groups, the applications shall be processed without regard to color or race, as required by authoritative judicial interpretation of the Constitution of the United States which is the supreme law of our State and Nation, and the applicant accepted or rejected in accordance with the approved rules and standards of admission for the particular school."

Under the above policy any applicants for admission to those schools will be dealt with on the same basis regardless of race.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record in all proceedings of said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as provided in the Statutes of the United States; that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed, and the petitioners granted such other and further relief as may seem proper.

HARRY MCMULLAN,
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Office of the Attorney General;
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Attorneys for Petitioners.

Appendix to Petition

The pertinent provisions of General Statutes of North Carolina, Chapter 116, Section 100 are as follows:

> "Sec. 116-100. *Graduate courses for negroes; superintendent of Public Instruction as ex-officio member of boards of trustees.*—The board of trustees of the North Carolina College for Negroes is hereby authorized and empowered to establish from time to time such graduate courses in the liberal arts field as the demand may warrant, and the funds of the said North Carolina College for Negroes justify. Such courses so established must be standard.
>
> "The board of trustees of the North Carolina College for Negroes is authorized and empowered to establish departments of law, pharmacy and library science at the above-named institution whenever there are applicants desirous of such courses. Said board of trustees of the North Carolina College for Negroes may add other professional courses from time to time as the need for the same is shown, and the funds of the state will justify."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 751

WILLIAM DONALD CARMICHAEL, JR., PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA; HENRY P. BRANDIS, JR., DEAN OF THE LAW SCHOOL OF THE UNIVERSITY OF NORTH CAROLINA; LEE ROY WELLS ARMSTRONG, DIRECTOR OF ADMISSIONS OF THE UNIVERSITY OF NORTH CAROLINA; ARCH T. ALLEN, SECRETARY OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA; AND THE UNIVERSITY OF NORTH CAROLINA, A BODY INCORPORATE,

Petitioners,

against

FLOYD B. McKISSICK, SOLOMON REVIS, JAMES LASSITER AND J. KENNETH LEE,

Respondents

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Opinion of the Court Below

The opinion of the District Court is reported in 93 F. Supp. 327. The opinion of the United States Court of Appeals for the Fourth Circuit was delivered March 27, 1951, and is reported in 187 F. 2d 949.

Jurisdiction

The facts sufficient to support the jurisdiction of this Court are stated in the petition for Writ of Certiorari.

Cases believed to sustain the jurisdiction of this Court are:

Dept. of Treasury v. *Wood Corp.*, 313 U. S. 62 (1941);
Valentine v. *Chrestensen*, 316 U. S. 52 (1942);
Railroad Commission v. *Oil Co.*, 310 U. S. 573 (1940); and
Hague v. *C. I. O.*, 307 U. S. 496 (1939).

Specification of Error

The jurisdiction of this Court is invoked under the terms of Title 28 U. S. C., Section 1254(1), and in support of its petition the petitioners and appellees below respectfully suggest that the Court of Appeals erred in one or more of the following particulars:

1. The Court of Appeals erred in refusing to hold that the constitutional requirement of the Fourteenth Amendment was discharged if the two law schools, considered as a whole and considering the strength and weakness of each, provided a substantially equal opportunity for a legal education.

2. The Court of Appeals erred in adopting a test of the "separate but equal" rule which precludes any possibility of maintaining a separate law school for negroes contrary to the controlling decisions of this Court.

3. The Court of Appeals erred in disregarding the findings of fact made by the District Court as to the facilities offered which were supported by competent evidence and not "clearly erroneous".

Argument

The facts are stated in the petition and, in detail, in the specific findings of fact of the District Court.

It is the established rule of this Court, as set out in the leading case of *Plessy* v. *Ferguson*, 163 U. S. 537, that a state may require separate facilities for its white and Negro citizens if such facilities are substantially equal. *Hall* v. *DeCuir*, 95 U. S. 485. And this rule is applied to the requirement of providing separate and substantially equal educational facilities in both elementary and professional schools.

Plessy v. *Ferguson*, 163 U. S. 537; 41 L. ed. 256;
Cummings v. *Richmond County Board of Education*, 175 U. S. 528;
Gong Lum v. *Rice*, 275 U. S. 78;
Missouri ex rel Gaines v. *Canada*, 305 U. S. 337;
Sipuel v. *Board of Regents*, 332 U. S. 631;
Fisher v. *Hurst*, 333 U. S. 147.

In two recent Law School cases the Court has expressly declined to reconsider the rule.

Sweatt v. *Painter*, 339 U. S. 629;
McLaurin v. *Oklahoma State Regents*, 339 U. S. 637.

This "separate but substantially equal" rule as honestly applied to educational facilities necessarily embraces several elements:

(a) The two compared facilities need not be identical in every respect. No two schools are ever completely identical.

(b) Equality can only be attained or found by a balancing of the advantages and disadvantages of the two compared institutions.

(c) An applicant for admission cannot be given discretion to make his own subjective comparison of the two insti-

tutions and elect which he will attend. This would, of course, completely negative segregation.

(d) The determination that the two institutions afford substantially equal educational opportunities must be entrusted, in the first instance, to some authority of the state.

(e) The determination of the state on the question of substantial equality must have a presumption of validity, subject only to rebuttal in case the determination of the state is in bad faith—and possibly subject to rebuttal also in case the state's determination is entirely unreasonable.

(f) Criteria must not be applied which make it impossible for the state ever to find substantial equality in comparing white and Negro institutions.

It would seem apparent that, if these principles are violated, the established rule of authorizing a state to provide "separate but substantially equal" facilities for the two races would be meaningless.

It is equally clear, we believe, that the Circuit Court has violated every one of the essential elements of the rule, as set out above. Let us consider the situation presented in this case.

The State of North Carolina has acted in good faith to comply with and implement the doctrine of substantial educational equality between the races as that doctrine has been developed by the decisions of this Court. In fact, North Carolina has undoubtedly been the leader of the Southern States in this respect.

In 1925, North Carolina began the operation of a Liberal Arts College for Negroes in Durham, having heretofore in 1923 purchased an existing proprietary school which then had about 100 students and having operated it as a training school for negro high school teachers. That college has grown so that in 1950, there were 1,200 students.

In 1939, a Negro Law School at the college was authorized

by the Legislature which began to operate in 1940 (Gen. Stats. N.C. 1943, Ch. 116 Sec. 100). It has operated continuously since then, despite the vicissitudes of the War. The Law School is accredited by the American Bar Association, the North Carolina Law Examiners, and has all the qualifications for admission by the Association of the American Law Schools.

In the instant case there is no doubt about the good faith of the State of North Carolina in its effort to provide substantially equal Law Schools for Negroes and whites. As to the bona fides of North Carolina's effort, plaintiff's witness Dean Griswold testified (Plf. appdx. P. 230) in part as follows:

> "Q. There has no suggestion been made to you by anyone, has there, that the Law School of North Carolina College was created for just the purpose of this kind of litigation? A. That is not as easy to answer as it sounds. I fully believe it was created as a direct result of the Gaines case, and that there was no law school in North Carolina to which a Negro could go until the Supreme Court said the State must do something about it. Then the school was created—not as a result of the Sipuel and Sweatt cases. It has been operating since 1939, and I think it is very much to the credit of the people of North Carolina that, though they got off to a late start, they got off to an earlier start than most anybody else did, and I think they have been making a bona fide effort to operate a good school in this college. In other words, let me say this: *to me this is* a different and a harder problem than the Oklahoma and Texas were * * * where, in my opinion, the schools were utterly inadequate, the schools were perhaps—well, perhaps fly-by-night is too harsh a word to apply to them, but they were made for the sole purpose of anticipating a threatened lawsuit and did not, as of the time of the lawsuit, have any period of experience in actual operation and had substantially no student body at all.

"Now the North Carolina College Law School has been in operation for eleven years; it has been well supported by the State; it has a Dean, and I believe the President of the College, who are determined to do it on as good a basis as they can." (Emphasis supplied.)

And John G. Hervey, a thoroughly competent and disinterested witness for the defendants, a man with nation-wide experience in examining and appraising law schools, expressed the definite opinion (Def. Appdx. p. 30) that the State of North Carolina had more than met its obligation in providing a separate but equal opportunity for legal education for its Negro citizens.

Acting thus in good faith North Carolina is maintaining for Negroes a Law School at North Carolina College which law school it believes to be "substantially equal" to the University Law School which is provided for white students.

In the case of other graduate schools of the University where separate and equal facilities are not provided for Negroes, the State recently ordered that "applications [for admission] shall be processed without regard to color or race". And one of three or four Negro applicants has already been accepted for the University Medical School. This School normally accepts about 8% of all applications.

As to the University Law School (for whites) and the College Law School (for negroes), substantial equality has been found to exist not only by the State itself but also by the District Court who heard the testimony of many witnesses for the State who were personally familiar with legal education in North Carolina, and who had personally inspected the two institutions.

The District Court found that differences existed in the two Schools, as there are differences in any two institutions. It further found that because of some of these differences, students at the University of North Carolina Law School

enjoyed an advantage, while because of other differences, the students at the College Law School profited. The District Court then found that, when all the factors were considered and the two Schools were compared, "it would be no substantial advantage to these plaintiffs to admit them to the University Law School" and that "disadvantages at the College Law School are more than offset by the disadvantages existing at the University Law School".

And the ultimate findings of the District Court are stated as follows:

> "The Court accepts the evidence in this case tending to prove that when each of the two law schools meets such standards as those set by the State Bar Examiners and the American Bar Association, and has adequate libraries, and other facilities, and competent teachers, the differences such as differences in size of student bodies and number of alumni are not such as will affect the educational opportunity at other schools under comparison in the absence of some special circumstances capable of concrete proof. The evidence in this case does not justify a finding that the differences between the two schools results in any substantial inequality of educational opportunity." (Finding 14, Defs. Supp. Appdx. p. 51)

Despite these District Court findings and conclusions, the Circuit Court, without any ruling that the District Court findings were "clearly erroneous", decided that the College Law School was so inferior as to violate the Constitutional requirement.

The principal reasons advanced or mentioned by the Circuit Court were:

(a) The teachers at the University Law School are more experienced, have better reputations, and have written more legal articles than those at the Negro law school;

(b) There is a Law Review at the University but none at

the College. (Parenthetically, there is a Moot Court at the College and none at the University);

(c) The University Law School has a chapter of the Order of the Coif and the College has not;

(d) There are more students—(and, incidentally, larger classes)—at the University Law School;

(e) The buildings and equipment at the College Law School are somewhat (but temporarily) inferior to those at the University Law School;

(f) The University and its Law School are older, and

(g) Has a greater tradition and a better national reputation, and

(h) Has more—and more distinguished—alumni.

(i) The Negro law students are deprived of association with white students.

As to the latter point the Circuit Court says:

> "The University Law School has 280 students, who, in their point of origin and in their previous training and economic and social status, represent a cross section of the white people of the State who constitute 74 per cent of its population. From this society the colored law students, who number only 28, are excluded. We hardly need the testimony of the experienced and qualified law school men, which the record contains, to realize that this act deprives the minority of educational advantages which their contemporaries enjoy."

Of the eight reasons of the Circuit Court mentioned above, the first four present matters of judgment both as to their importance *per se* and as to their weight in the evaluation of the whole question of substantial equality, in the constitutional sense, of the two institutions. As to some of these matters taken alone—as well as to others which arise on the evidence—there are honest and intelligent differences of opinion.

Some authorities on legal education think a small school has advantages over a large, and some think that a large has advantages over a small. Some prefer the personal attention which comes in small law classes, others feel that the discussion in larger classes is more advantageous. Some favor specialization in the teaching of law, others favor more general courses. There is considerable difference of opinion as to whether a Law Review is helpful or harmful to the students. And you will hear strong arguments on both sides as to the relative advantages of a Law Review (as at the University) and a Moot Court (as at the College).

Some students, and some Law School authorities, prefer teachers who give their entire time to the instruction of students, others prefer teachers who engage in wide extra curricular activities such as writing or research. Competent young teachers, although less experienced, are sometimes preferred because of their enthusiasm and ability to understand the students' point of view. Others prefer the older and more experienced professors.

Old Colleges and Universities are favored by some because of their tradition, new institutions are favored by others because of their modernity. There are varied views as to building and equipment, including even the type of desk stressed by one of plaintiff's witnesses.

Certainly within these areas of differing opinions, a state acting in good faith has a reasonable right to determine the relative merits and weigh advantages against disadvantages. Even in the case of business corporations the Board of Directors, when acting in good faith, are protected in their exercise of judgment and discretion in the protection of stockholders. How much stronger is the case for a State of the Union, whose good faith and fair purpose remains unchallenged as it does in this case.

In the operation of separate Law Schools for the white

and Negro races, in the absence of evidence of bad faith, it must be assumed that the State's officials responsible for the organization and operation of the schools will exercise sound discretion in the purchase of supplies, and construction of buildings, the employment of teachers and other administrative details. Certainly, the federal courts cannot effectively control the details of the operation of law schools.

It must be remembered that no two educational institutions, public or private, can ever be exactly alike in every respect. Equality must always be a matter of judgment in determining advantages and disadvantages and in weighing them. This balancing is the only practical way of determining the question of equality. The measure is equivalency and not identicality.

Of course, these principles do not authorize evasion or subterfuge or colorable action. None exists—or is here suggested. Nor, on the other hand, is there justification for captious and unrealistic criticisms of a judgment exercised in good faith by a state. And this is particularly true when, as here, the District Court after careful consideration has determined—has in fact made an "on the ground determination"—that the College Law School affords not only adequate legal educational opportunities but also affords opportunities at least substantially equal to those of the University Law School.

The other four matters considered by the Court also present this same problem of determining advantages and disadvantages of one Law School and weighing them against advantages and disadvantages of the other school. Incidentally, the consideration last mentioned—the value of the "association" of white and colored law students—is entirely unrealistic and impractical and would seem to belie any genuine effort of any Court or other body to weigh

the value of two law schools in a practical manner. But, be that as it may, the existence or the advantages or disadvantages of such "association" or lack of it certainly is only one of the many possible factors in the constitutional requirement.

The objection to the four last-mentioned points made by the Circuit Court is that their necessary effect is to make it impossible to have any system of separate law schools. If we are to face the situation frankly and logically, a decision adverse to a state, based on age of school, tradition of school, number of alumni, distinction attained by alumni, and ratio of school population and state population would set up standards of comparison which would make it impossible as a practical matter to apply the laws laid down in the *Plessy* case and the others cited in the early part of this brief.

Neither the state nor anyone else can change the age of colleges and universities; nor can they change that part of reputation which is based on tradition. Yale will never be as old as Harvard, and the University of Virginia will never be as old as the University of North Carolina. The North Carolina College for Law, established in 1939, will never be as old as that group of colleges which were started in the 1920's, but will always be older than those which have been started in the past decade.

Nor can anyone govern the number of accumulated alumni nor the past attainments of these alumni nor the racial proportion of the population of the state. There is no need to belabor the point. To deny a review in this case is to permit the unexamined departure by the Circuit Court from the established doctrine of this Court permitting states to maintain segregated and substantially equal educational institutions.

The same result would follow from unreviewed acquies-

cence by this Court in two other principles stated or inferred by the Circuit Court. The first of these is the suggestion that inequality can arise from considering certain particular advantages or disadvantages of two institutions without evaluating the advantages or disadvantages and without weighing one against the other—without, in other words, looking at the whole picture. Certainly this is not the criterion. If it were, then nearly any school could be proven to be both superior and at the same time inferior to another school, an absurb result.

The same is true of the closely related suggestion that the individual student should have the absolute right of choice between two institutions regardless of the fact that on an overall basis there is equality between them. Such a principle would, of course, absolutely destroy segregation regardless of equality. But there has been no such rule established by the Supreme Court. Under the established law, there may be segregation by a state on either a geographical or racial or a sex basis, provided there is substantial overall equality in the facilities offered.

The theory of "no segregation at all"—is the rationale of the plaintiffs themselves, their sponsors and of their witnesses, but is contrary to all decisions of this Court.

The two plaintiffs and the seven intervenors were each students at the North Carolina College at Durham and each sought to *transfer* as an advanced student to the University Law School at Chapel Hill. The original plaintiffs had to abandon the case; one because he had graduated from College Law School, taken the Bar Examination and been admitted to the North Carolina Bar; the other because he was not a resident of North Carolina and had been receiving unemployment relief payments from a neighboring state of which he claimed to be a resident.

Of the six original intervenors, three declined to proceed

and withdrew. None of them testified. The seventh, permitted to intervene at the opening of the trial, testified briefly as to the rejection of his application at the University Law School and admitted on cross-examination that the North Carolina College Law School was a good school, that he had voluntarily entered it, and that he had no complaints.

The plaintiffs' corps of counsel were all volunteers and veterans in "segregation" cases. The record clearly shows that they had no interest in the particular plight of any plaintiff or intervenor whom they ostensibly represented, but were out to destroy North Carolina's conscientious and expensive efforts to provide equal but segregated educational opportunities to all its citizens.

The Circuit Court opinion introduces confusion in the rules which must be followed by a state that is conscientiously trying to provide equal education for Negroes and whites. With the Circuit Court's opinion as the basis, how would any state go about complying with the established doctrine of the *Plessy* case in setting up and maintaining separate facilities for legal education?

Disregard of Rule 52

The previous discussion emphasizes the importance of complete compliance in this case with the provisions of Rule 52, Federal Rules of Civil Procedure, and with the decisions thereunder. The rule provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment • • • Findings of fact shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the Trial Court to judge the credibility of the witness."

Rule 52 does not permit a Circuit Court to reverse the findings of a District Court without finding that the District Court findings are "clearly erroneous". There was no such finding here by the Circuit Court.

The District Court made complete findings of fact on every phase of the case and these findings were based on the testimony of many witnesses, including eminent lawyers, judges, members of the State Board of Law Examiners and law school teachers who gave convincing and competent evidence which fully sustained the conclusions of law and the judgment of that Court. These findings of fact are set out in the supplemental appendix to the appellees' brief and also copied in part on pages 21 through 35 of the appellees' brief in the Circuit Court of Appeals.

The District Court had before it the practical results of education at the College Law School—the objective measure of its worth—the recognition of the College Law School by the State Bar Examiners, by the American Bar Association having the qualifications for admission to the American Association of Law Schools, together with the record made by its graduates in the State Bar examinations. The District Court was aware that many out-of-state Negroes, who have an opportunity to attend non-segregated schools, voluntarily chose the North Carolina College Law School.

The District Court saw the schools, the libraries, the desks, the buildings, the plans for improvements, the personnel, students and faculty. It heard and saw those persons who knew more directly about the value of the two schools being compared. And it rendered a thorough and thoughtful opinion supported by its finding of fact.

The Circuit Court did not find that the District Court findings were erroneous. We submit that they should be accepted by this Court. The District Court has found substantial equality between the two law schools.

The findings of fact of the District Court, being fully supported by the evidence, accurately reflect the comparative qualities of the two Law Schools. The Court, in its judgment, found facts relating to the opportunities afforded the Law students at the two Schools. However, the Court of Appeals largely ignored such findings and rejected the factual predicate of the District Court that the evidence demonstrated opportunities substantially equal in character. The Circuit Court went much further and set up a completely different factual basis for its conclusion by considering and applying isolated differences and intangibles not incorporated in specific findings and unsupported by the evidence.

The opinion of the Circuit Court emphasized the fact that the efficiency of the professors at the College Law School was impaired because of the large number of courses which they were required to teach, and to substantiate this assertion the Court refers to the testimony of Dean Turner of the College Law School, saying that he testified that he taught 17 courses. An examination of the record (plfs. Appdx. 16) will reveal that Dean Turner actually testified that he taught only three courses, "mainly constitutional law, contracts, and sometimes wills." The other courses which he named were part of an enumeration of all the courses taught at the Law School by the entire faculty. He had been interrupted in the course of this enumeration by a question pertaining to the courses which he himself taught and he gave the above quoted answer.

The Court below observed that witnesses for the defendant and the Deans of the two Law Schools did not testify that the faculties of the two schools were equal. There is no evidence that the witnesses knew the members of the faculties and their respective teaching abilities, nor that the Dean of either school had sufficient knowledge of the

capacities of both faculties to justify opinion testimony. There was no evidence of the individual teaching ability of the members of the faculties and no evidence that any one faculty member was inferior to any other faculty member. The burden was on the plaintiff to establish inferiority of the College faculty and in the absence of evidence, the District Court was fully justified in its finding and the Circuit Court was in error in disregarding that finding.

The Circuit Court stated that "The members of the faculty have had no opportunity to study legislative problems in connection with the Institute of Government at the University, or as advisers to members of the State Legislature on Legislative Commissions." This statement is entirely unsupported by the evidence and while Dean Brandis testified that the Institute of Government had, in his opinion, "a wholesome effect on the student body" at the University Law School, there is no evidence that the faculty of the College Law School does not have the opportunity to study legal problems in connection with the Institute of Government or as advisers on State Legislative Commissions.

These are some of the instances in which the Circuit Court disregarded the findings of fact of the District Court and for all practical purposes substituted findings of its own which are not only unsupported by the evidence, but in some cases are in direct conflict with it.

This Court has repeatedly adopted the original findings of fact by the District Court against the conclusions of Courts of Appeals. *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 42, 71 L. ed. 534, 47 S. Ct. 255. The Court of Appeals neglected to follow the Rule that conclusions or findings on conflicting evidence will be inquired into only to ascertain whether there is evidence to sustain them. The Rule goes further to require

that, there being such evidence in the record, the conclusions or findings will not be disturbed. *Varner* v. *New Hampshire Savings Bank,* 240 U. S. 617, 60 L. ed. 828, 36 S. Ct. 409. *United States* v. *Jefferson Electric Manufacturing Company,* 291 U. S. 386, 407; 78 L. ed. 859, 54 S. Ct. 443.

Conclusion

This case presents to the Court the bona fide efforts of a just and forward-looking State to follow the established rules of this Court in providing equal professional education for its Negro citizens and its white citizens. The nominal plaintiffs and their sponsored witnesses are seeking to defeat these efforts. And the Circuit Court's opinion, if not reexamined by this Court, would have that result.

The State of North Carolina has been more successful than most other States of the South in the field of cordial, harmonious and just racial relations. It has led the way in solving that great social problem. It has taken pride in this accomplishment in the field. We have valued the recognition by others of these accomplishments. It has had every incentive and desire to continue to work toward the best possible solution of an admittedly difficult problem.

Neither the State nor the University will permit any citizen to be unfairly treated. They believe in equality of opportunity for all citizens of every race. North Carolina was the first Southern State to repeal the poll-tax as a requisite for voting. It has provided generously and without discrimination for Negro education in its public schools and colleges.

From the standpoint of the educational problem and its solution, any ruling which discourages a fair effort by a fair-minded and just state to provide equality of educational opportunity for all of its citizens of every race is a step backward.

In this case the policy of a sovereign state has been struck down by the Court of Appeals without regard for the facts found by the District Court which should have been binding upon its consideration of the cause. In 1939 the General Assembly of North Carolina authorized the establishment of the Law School at the North Carolina College (General Statutes of North Carolina, Chapter 116, Section 100). While the action here before the Court does not specifically involve the constitutionality of a State Statute, yet inferentially and as effectively as if the attack were direct, the decision of the Court of Appeals strikes at the very heart of a legislative policy set out in the Statute. This has been accomplished by decision contrary to the Rules of Practice and the controlling expressions contained in the decisions of this Court. To permit the mandate of the Court of Appeals to stand would be to do violence to all concepts of orderly procedure and work an injustice upon the people of North Carolina, whose good faith is unquestioned and whose compliance with the obligations cast upon them to afford equality of oportunity to its citizens is established beyond peradventure.

For the foregoing reasons, your petitioners submit that their Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be granted to the end that uniformity in judicial determination may be preserved.

Respectfully submitted,

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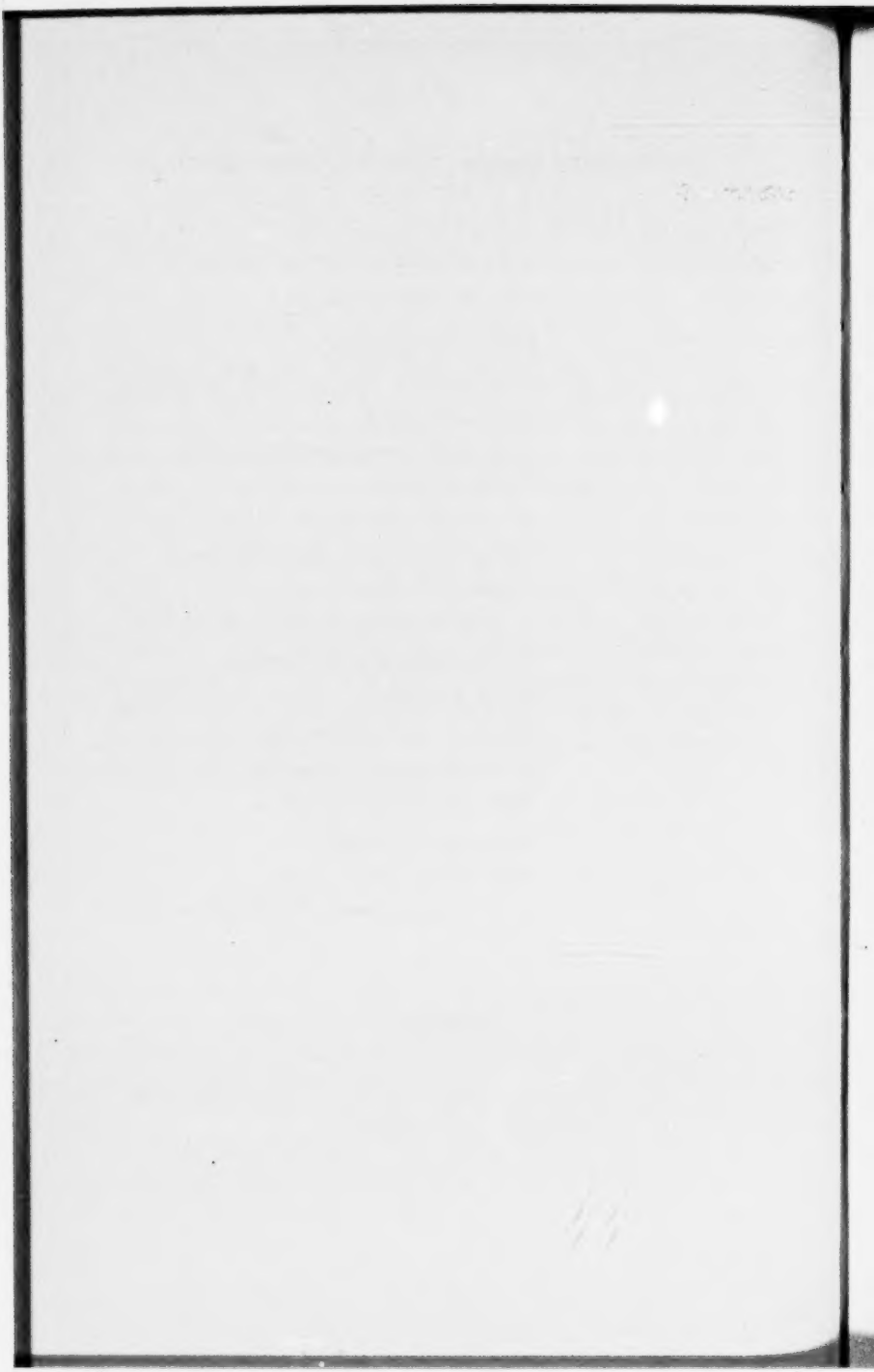

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Supreme Court of the United States

October Term, 1950

No. 751

WILLIAM DONALD CARMICHAEL, JR., President of the University of North Carolina; HENRY P. BRANDIS, JR., Dean of the Law School of the University of North Carolina; LEE ROY WELLS ARMSTRONG, Director of Admissions of the University of North Carolina; ARCH T. ALLEN, Secretary of the Board of Trustees of the University of North Carolina; and the University of North Carolina, a body Incorporate,

Petitioners,

against

FLOYD B. McKISSICK, SOLOMON REVIS, JAMES LASSITER and J. KENNETH LEE,

Respondents.

ROBERT L. CARTER,
THURGOOD MARSHALL,
C. O. PEARSON,
FRANK D. REEVES,
SPOTTSWOOD W. ROBINSON, III,
Counsel for Respondents.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari and brief in support thereof filed by petitioners herein fail to show any recognizable ground for review by this Court.

The petition in this case, like the petition for writ of certiorari in *Sweatt* v. *Painter*, 339 U. S. 629, fails to distinguish between findings of fact by a trial judge and conclusions of law by a trial judge determining the application

of the Fourteenth Amendment to the United States Constitution.

The plain and concise statements of law set forth in the unanimous opinion in *Sweatt* v. *Painter* have been reenforced by the decision of this Court in *Board of Supervisors of Louisiana State University et al.* v. *Roy S. Wilson,* 95 L. ed. (Ad. Op.) 200, in which this Court affirmed the judgment of the United States District Court for the Eastern District of Louisiana granting a preliminary injunction restraining the Board of Supervisors of Louisiana State University from enforcing an order excluding Negroes from admission to the law school of Louisiana State University. In that case there was a separate Negro law school in existence which had been in operation for several years.

The only difference between the facts in the instant case and the facts recognized by this Court in *Sweatt* v. *Painter,* is that the Negro law school in North Carolina had been in existence longer than the Negro law school in Texas. The other point raised by petitioners which was considered and rejected by the Court of Appeals is that the state of North Carolina was proceeding "in good faith." The Court of Appeals considered this point and concluded that "The situation differs in circumstance but not in principle from the decision in *Sweatt* v. *Painter* . . ." The Court of Appeals then quoted from the opinion of this Court in *Sweatt* v. *Painter* and concluded that the decision of the District Court should be reversed.

The opinion and judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case is clearly in keeping with the decision of this Court in the two cases cited above.

It should also be noted that the University law school (white) holds a summer session and the college law school (Negro) does not hold a summer session.

It is, therefore, respectfully submitted that this Court should, during this term, prior to commencement of the sum-

mer session, either affirm the decision of the United States Court of Appeals for the Fourth Circuit or refuse to issue its writ of certiorari.

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